No. 92-8841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KITRICH POWELL,
Petitioner,

v.

NEVADA,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Consistent with *Griffith v. Kentucky*, 479 U.S. 314 (1987) and the Supremacy Clause, when a state court reaches and decides a federal constitutional question in a criminal case which is pending on direct appeal, can it decline to give the benefit of its decision to the aggrieved party in the case before it.

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BRIEF FOR PETITIONER

Petitioner Kitrich Powell respectfully prays that this Court reverse the judgment of the Supreme Court of Nevada affirming his conviction and sentence of death.[1]

OPINIONS BELOW

The opinion of the Nevada Supreme Court is published as *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992). The order denying petitioner's timely petition for rehearing is unpublished. JA 22.[2]

JURISDICTION

The decision of the Supreme Court of Nevada affirming petitioner's conviction and sentence was filed on Septemper 3, 1992. A timely petition for rehearing was denied on February 23, 1993. On May 24, 1993, the petition for certiorari was filed, and this Court granted the petition on October 4, 1993. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article 6 of the United States Constitution provides, in pertinent part:

> "This Constitution . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

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[1] There are no parties to this proceeding other than those stated in the caption.

[2] ROA refers to the record on appeal in the Supreme Court of Nevada, and JA refers to the Joint Appendix.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On November 3, 1989, petitioner Kitrich Powell brought Melea Allen, the child of his girlfriend, to the emergency room at the University Medical Center in Las Vegas. The child was unconscious by the time she was checked into the hospital. While at the hospital that day, petitioner was interrogated by a police officer and arrested without a warrant for violating Nev. Rev. Stats. § 200.508 (child abuse). ROA 11, 3133, 3144-3146, 3606-3608. Petitioner remained in custody and on November 7, 1989, he was given warnings pursuant to *Miranda v. Arizona*, 386 U.S. 434 (1966) and interrogated again. Petitioner gave a statement which was admitted at trial. ROA 3630, 3663-3679. No judicial officer reviewed the legality of petitioner's arrest or detention before November 7, 1989. ROA 11.[3]

Melea Allen died in the hospital, and petitioner was charged with, and convicted of, first degree murder. ROA 30, 4098. He was sentenced to death on June 10, 1991.

[3] An element of confusion exists with respect to the actual date of the probable cause review. The signature of the justice of the peace on the warrantless arrest form is undated. The form has a stamped date of November 7, 1989, in the space marked "first appearance." ROA 11. The minutes of the justice court, however, do not show an initial appearance until November 13, 1989, ROA 4, and no complaint was on file until November 8, 1989. ROA 5. The Nevada Supreme Court noted the confusion as to when petitioner was first brought before the magistrate but it assumed that the probable cause review took place on November 7, 1989. JA 5; 838 P.2d at 924. In this brief, petitioner will refer to the date of the probable cause review as no earlier than November 7, 1989.

ROA 4798, 4849. On direct appeal, the Supreme Court of Nevada, sua sponte, considered the issue of unreasonable delay in the probable cause determination, in light of this Court's intervening decision in *County of Riverside v. McLaughlin*, —— U.S. ——, 111 S.Ct. 1661 (1991). The court held that *McLaughlin* rendered unconstitutional the statutory provisions for the first appearance before a magistrate, Nev. Rev. Stat. § 171.178, which it viewed as the mechanism for making the probable cause determination. The statute permits a seventy-two hour delay, excluding non-judicial days. The court recognized that its ruling meant that petitioner's probable cause determination was unreasonably delayed and further determined that petitioner suffered prejudice as a result of the delay. The court declined to give the benefit of its ruling in the case to petitioner, however, holding that *McLaughlin* would not be given retroactive effect. JA 6 n.1; 838 P.2d at 924 n.1.

SUMMARY OF ARGUMENT

The narrow issue in this case is whether the Supreme Court of Nevada can decline to apply a controlling precedent of this Court to a case pending before it on direct appeal. The Supremacy Clause dictates that this Court's decisions interpreting the United States Constitution be applied by all courts, because they are the "Supreme Law of the Land." U.S. Const. Art. 6 cl. 2. Under *Griffith v. Kentucky*, 479 U.S. 314 (1987), all courts are required to apply decisions of this Court which impose procedural or substantive rules of constitutional stature, at minimum, to all cases not yet final on direct appeal at the time the decision is rendered. There is no dispute that petitioner's case was not final on appeal at the time *County of Riverside v. McLaughlin*, —— U.S. ——, 111 S.Ct. 1661 (1991) was decided. There is also no dispute that the Nevada Supreme Court found a violation of *McLaughlin* but did not apply *McLaughlin* to petitioner's case. The decision of the Nevada Supreme Court is

inconsistent with the command of *Griffith*, and it therefore violates both the Supremacy Clause and the underlying principles of equal protection enunciated in *Griffith*.

ARGUMENT

I. THE RECORD DEMONSTRATES A PRIMA FACIE VIOLATION OF McLAUGHLIN.

It is clear that the Nevada Supreme Court properly found a straightforward violation of *McLaughlin*. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court recognized that the Fourth Amendment required states to

> "provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."

Id. at 125 (footnotes omitted). In *McLaughlin*, this Court refined *Gerstein* and imposed a clear standard for the timeliness of probable cause determinations.

> "Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.
>
> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably.
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> . . . .
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> Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest."

McLaughlin, supra, 111 S.Ct. at 1670.

In *McLaughlin*, this court left the states considerable latitude in deciding how to structure the procedure for affording the probable cause determination. The court recognized that states might find it efficient to combine the probable cause determination with other procedures, such as bail hearings, arraignment or appointment of counsel. To accommodate these interests, *McLaughlin* allows the states to incorporate the time required to arrange for such proceedings in the period of delay before the probable cause determination which is tolerated as "necessary." In its resolution of the *McLaughlin* issue in this case, the Nevada Supreme Court treated the state statute providing for a suspect's first appearance before a magistrate as the vehicle for securing the probable cause determination. JA 5-6; 838 P.2d at 924.[4] In holding that *McLaughlin*

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[4] Nev. Rev. Stats. § 171.178 provides in pertinent part:

> 1. Except as provided in subsections 5 and 6, a peace officer making an arrest under a warrant issued upon a complaint or without a warrant shall take the arrested person without unnecessary delay before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charge with offenses against the laws of the State of Nevada.
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> . . . .

[Continued]

renders the state first appearance statute unconstitutional, the Nevada Supreme Court acknowledged that as long as the two proceedings were combined, the time limits permitted by the statute were inconsistent with the forty-eight hour limit prescribed by *McLaughlin*:

> "Based on *McLaughlin*, we hold that a suspect must come before a magistrate within forty-eight hours, including non-judicial days, for a probable cause determination."

JA 5-6; 838 P.2d at 924. (Footnote omitted.)

There can be no dispute here that petitioner's probable cause determination was delayed beyond the constitutional limit imposed by *McLaughlin*: petitioner was arrested without a warrant on November 3, 1989, and he did not receive a probable cause review, or a combined first appearance before a magistrate, before November 7, 1989. ROA 11. It is equally clear that the delay has not been shown to be necessary, due to any "bona fide emergency or other extraordinary circumstance." It appears that the only document placed before the magistrate was a single form with the arresting officer's declaration. While the declaration itself is not dated, it records the time of the arrest as 3:00 p.m. (1500 hours) on November 3, 1989, and two mechanical data stamps, suggesting that the form was completed by then, show the date and time as 3:42 p.m. on November 3, 1989. ROA 11. The entire four-day delay in petitioner's probable cause determination was therefore unnecessary. The unnecessary delay resulted in a seizure of petitioner's person, e.g., *California*

[4] [Continued]

3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding non-judicial days, the magistrate:

(a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and

(b) May release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay.

v. Hodari D., —— U.S. ——, 111 S.Ct. 1547, 1549 (1991), and this seizure was illegal under the Fourth Amendment.

II. THE McLAUGHLIN VIOLATION RESULTED IN PREJUDICE TO PETITIONER REQUIRING A REMEDY UNDER STATE AND FEDERAL LAW.

The Nevada Supreme Court's decision acknowledged that the violation of *Gerstein* and *McLaughlin* would invalidate the judgment in this case. The court cited its state remedial law and indicated that reversal was required if *McLaughlin* were applicable:

> "This court has repeatedly held that the defendant must show prejudice which resulted from the delay. See e.g., [*Huebner v. State*, 103 Nev. 29] at 32, 731 P.2d [1330] at 1333 [(1987)]; *Morgan v. Sheriff*, 92 Nev. 544, 546, 554 P.2d 733, 734 (1976).
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> . . . .
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> Powell made statements to the police . . . These statements, which were presented to the jury, were clearly prejudicial to Powell."

JA 5; 838 P.2d at 924. This is consistent with state precedents providing that statements elicited as a result of unnecessary delay in pretrial proceedings are inadmissible:

> "Mere delay between arrest and arraignment, without some showing of prejudice to defendant's constitutional rights, does not deprive the court of jurisdiction to proceed. [Citations]. Where there has been no interrogation during the delay, and the accused has not confessed or made incriminating statements, the delay has caused no prejudice to the accused, and his rights have not been violated. [Citation.]"

Huebner v. State, supra, 103 Nev. at 32; *Sheriff v. Berman*, 99 Nev. 102, 106, 659 P.2d 298 (1983); *Morgan v. Sheriff, supra*, 92 Nev. at 546. When custodial interrogation has produced a statement, however, the delay is prejudicial:

> "In the state courts the failure to bring the arrested person immediately before a magistrate after his arrest has been asserted to make any confession or admission obtained from him during the interim inadmissible if the delay was causally connected with the securing of the confession. [Citations.]"

Brown v. Justice's Court, 83 Nev. 272, 276, 428 P.2d 376 (1967).[5]

State and federal law do not require the reversal of a conviction solely because of an illegal delay in the probable cause determination. *Gerstein v. Pugh, supra*, 420 U.S. at 119; *Huebner v. State, supra*, 103 Nev. at 32. The state law rule prescribed by the Nevada Supreme Court, however, required the exclusion of petitioner's statement obtained on November 7, 1989, and the Court's decision acknowledged the prejudice to petitioner, and hence the necessity of reversal under state law, if *McLaughlin* were applied in this case.[6] Further, under federal law, the illegal delay in the probable cause determination requires reversal of the conviction. When a statement is obtained as a result of a Fourth Amendment violation, the principles lying at the "crossroads of the Fourth and the Fifth Amendments", *Brown v. Illinois*, 422 U.S. 590, 591 (1975) require its exclusion unless the taint of the illegality is attenuated. *Id.* It is clear that the giving of *Miranda* warnings does not conclude this issue:

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[5] These authorities do not distinguish between delays in the various pretrial proceedings. The Nevada Supreme Court's decision in this case, by subjecting the first appearance statute to analysis under *McLaughlin*, signalled that delay in the probable cause determination is on the same footing as delay in the first appearance and arraignment. JA 6; 838 P.2d at 924.

[6] Any novel analysis by this Court of the appropriate remedy under federal law, see, e.g., *United States v. Alvarez-Sanchez*, 975 F.2d 1396 (9th Cir. 1992), *cert. granted*, —— U.S. —— (1993), therefore will not affect the disposition of the case. See *Michigan v. Long*, 463 U.S. 1032, 1038-1042 (1983).

> "It is entirely possible, of course . . . that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited. See *Westover v. United States*, 384 U.S. 436, 496-497 (1966)."

Brown v. Illinois, supra, 422 U.S. at 603. This analysis of the voluntariness of a waiver of *Miranda* rights and of any resulting statement must take into account the period of illegal detention and not merely the giving of *Miranda* warnings:

> "Exclusion of a confession made without *Miranda* warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. *Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation."

Id. at 601 (footnote omitted).

The policies underlying the Fourth and Fifth Amendments support the exclusionary remedy in this situation. In *Gerstein*, this Court recognized the "high stakes" which are implicated in the seizure of a person by virtue of a warrantless arrest and further recognized that "[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest." 420 U.S. at 114. Chief among these is the isolating and coercive effect of the illegally-prolonged detention itself, which increases the likelihood that a suspect will speak involuntarily and therefore unreliably. Cf. *Beckwith v. United States*, 425 U.S. 341, 342, 346-347 (1976) (*Miranda* warnings not required when subject of interrogation was in own home and not in coercive setting of police cus-

tody); *Mathis v. United States,* 391 U.S. 1, 8 (1968) (White, J., dissenting) (*Miranda* rule should have no application "to inquiries conducted outside the allegedly hostile and forbidding atmosphere surrounding police station interrogation of a criminal suspect.")

> "In a *Gerstein* case the passage of time actually makes the violation worse. Although the taint of an unlawful arrest may tend to dissipate with time, it is not the arrest that is unlawful in a *Gerstein* case. It is, instead, the detention itself that becomes unlawful at a certain point, and the pressure to confess most likely increases as the detention gets longer . . . . Each moment of detention is a fresh violation, increasing the opportunity for the government to exploit the illegality."

Thomas, *The Poisoned Fruit of Pretrial Detention,* 61 N.Y.U.L. Rev. 413, 458-459 (1986) (footnotes omitted). In short, "illegal custody becomes more oppressive as it continues uninterrupted." 1 W. LaFave and J. Israel, *Criminal Procedure* § 9.4(a) at 744 (1984).

It is precisely this coercive effect which makes the exclusionary remedy of the Fourth Amendment, or a remedy under state law, appropriate for a violation of *Gerstein.* The *McLaughlin* decision explicitly recognizes that it is impermissible to delay the probable cause determination to gather further evidence about the charged offense. 111 S.Ct. at 1670. This prohibition plainly includes delays motivated by a desire to "soften up" the suspect for interrogation. See *id.* at 1676 n.3 (Scalia, J., dissenting). Only an exclusionary remedy will deter the exploitation of unnecessary delay for these purposes, which are impermissible under *McLaughlin.*

Prolonged detention is also likely to affect the reliability as well as the voluntariness of any statement produced by it, and thus an exclusionary remedy for a *Gerstein* violation increases the reliability of any resulting judgment. See *Withrow v. Williams,* —— U.S. ——, 113

S.Ct. 1745, 1761 (1993); *Johnson v. New Jersey,* 384 U.S. 719, 730 (1966); see also *Schneckloth v. Bustamonte,* 412 U.S. 218, 240 (1973). The oppressive effect of custody is likely to induce in the suspect a willingness to give false statements as much as to give accurate ones, simply in the desire to explain away the state's suspicions in order to get out of custody. In this case, for instance, the state argued that petitioner's statements produced by the prolonged detention were mostly false. ROA 3984, 3987-3988, 3998-4002. The effect of prolonged detention upon the reliability of statements elicited from a suspect is particularly important in capital cases, where the need for reliability is heightened. See *Ford v. Wainwright,* 477 U.S. 401, 411, 414 (1986) (plurality opn.). The societal cost of exclusion of such evidence is thus significantly less than exclusion of "inherently trustworthy tangible evidence" obtained as a result of an unlawful search. Cf. *United States v. Leon,* 468 U.S. 897, 907 (1984); *Stone v. Powell,* 418 U.S. 464, 479, 490-491 (1976). On the other hand, the deterrent effect on police and other prosecutorial agencies is likely to be substantial, since exclusion of evidence produced by an impermissibly-prolonged detention will remove the incentive to exploit the coercive effect of custody to obtain statements and will provide an incentive to eliminate unnecessary delays in conducting the probable cause hearing.[7]

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[7] There can be no reasonable argument that reliance on the state first appearance statute supplies a "good faith" basis for the state's action in this case. Cf. *Illinois v. Krull,* 480 U.S. 340, 349-350 (1987). Like *McLaughlin*'s standards for promptness in the probable cause review, the state statutory scheme requires the initial appearance to occur "without unnecessary delay." Also like *McLaughlin,* the statute imposes a time limit beyond which a deteniton is presumed to be unjustified. Finally, like the *McLaughlin* forty-eight hour rule, the seventy-two hour rule imposed by the statute does not validate unnecessary delays within that period but merely identifies the point beyond which the length of time must be justified by the state. Thus a police officer or other official could not have an objectively reasonable relief that a delay of less than

In this case, the Nevada Supreme Court did not apply *McLaughlin* and therefore it did not enforce its own remedy under state law. Although the state law remedy recognized in the Nevada Supreme Court's decision requires reversal of the conviction, that court should be allowed to dispose of that issue in the first instance. Compare *Yates v. Aiken*, 484 U.S. 211 (1987), with *Yates v. Evatt*, 500 U.S. ——, 111 S.Ct. 1884 (1991).[8] Again, since the Nevada Supreme Court did not apply *McLaughlin*, it did not consider the constitutional violation as a factor in its analysis of the admissibility of petitioner's statements under the Fifth Amendment.[9] Accordingly, the judgment must be reversed and remanded to the Nevada Supreme Court if the *McLaughlin* decision is applicable to this case.

III. THE NEVADA SUPREME COURT WAS REQUIRED TO APPLY THE McLAUGHLIN DECISION TO PETITIONER'S CASE WHICH WAS BEFORE IT ON DIRECT APPEAL.

Thus we come to the narrow issue presented for resolution here, which is whether the *McLaughlin* decision applies to petitioner's case. Having reached and disposed of the *McLaughlin* issue on the merits, and having found

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seventy-two hours would be permissible if that delay is not necessary. In any event, since the existence of any such relief was not suggested or litigated below, this case would be a wholly inappropriate vehicle for determining that issue.

[8] It must be assumed that the Nevada Supreme Court will correct its aberrant action in this case. In fact, in a case decided after petitioner's, the Nevada Supreme Court applied new federal constitutional rules to a case which was pending before it on direct appeal, although it did not acknowledge the existence of *Griffith*. *Felix v. State*, 109 Nev. 151, 849 P.2d 220 (1993).

[9] Although the court purported to find a waiver of petitioner's statutory rights to a prompt first appearance and arraignment as a result of his waiver of *Miranda* rights, JA 6-7; 838 P.2d at 925; it did not, and could not, find that the *Miranda* warnings had necessarily dissipated the taint of the illegal detention. *Brown v. Illinois, supra*, 422 U.S. at 607. See Argument V, below.

that *McLaughlin* was violated, the Nevada Supreme Court declined to apply that controlling decision to petitioner's case, although the case was before the court on direct appeal. Citing the retroactivity test derived ultimately from *Linkletter v. Walker*, 381 U.S. 618 (1965), the court held that "the forty-eight hour requirement mandated by *McLaughlin* does not apply to the case at hand." 838 P.2d at 924 n.1.

The Nevada Supreme Court's action plainly violated the federal constitution. The holding of *Griffith v. Kentucky*, 479 U.S. 314, 322, 328 (1987), could not be clearer:

> "In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.
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> . . . .
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> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break with the past."

This Court has relied upon the rule of *Griffith* in its subsequent criminal cases analyzing the availability of collateral review for constitutional violations. The obligation of state courts to apply current constitutional doctrine, and the difference, for equal protection purposes, between applying new constitutional rules on direct or collateral review, have been invoked as the rationale for restricting the availability of relief in collateral procedures. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opn.); see, e.g., *Lockhart v. Fretwell*, —— U.S. ——, 113 S.Ct. 838, 844 (1993); *Butler v. McKellar*, 494 U.S. 407, 414 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989); see also *Brecht v. Abrahamson*, —— U.S. ——, 113 S.Ct. 1710, 1720 (1993). For this scheme to retain

its legitimacy, however, state courts must be rigorously held to their obligation to enforce federal constitutional rights on direct appeal.

In civil cases, this Court has reaffirmed the *Griffith* rule and has emphasized the unequivocal duty of state court to apply federal constitutional law, including the federal equal protection principles underlying the *Griffith* rule itself. Thus the Court has recognized that the retroactivity analysis applicable to a constitutional precedent is as much a federal constitutional question as the underlying substantive issue.

> "The Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of federal law."

Harper v. Virginia Department of Taxation, —— U.S. ——, 113 S.Ct. 2510, 2519 (1993) (citations omitted). This Court summarized its position in its most recent decision:

> "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith's* ban against 'selective application of new rules.' 479 U.S., at 323, 107 S.Ct. at 713. Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, *id.* at 322, 107 S.Ct. at 712, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit the 'substantive law [to] shift and spring' according to 'the particular

> equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. [*James B.*] *Beam* [*Distilling Co. v. Georgia*], —— U.S., at ——, 111 S.Ct. [2439], at 2447 [(1991)] (opinion of SOUTER, J.). Our approach to retroactivity heeds the admonition that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' *American Trucking* [*Assns., Inc. v. Smith*] 496 U.S. [167] at 214, 110 S.Ct. [2323] at 2350 [(1990)] (STEVENS, J., dissenting)."

Id. at 2517-2518.

In light of this authority, little argument—indeed, no argument—is necessary to demonstrate that the Nevada Supreme Court could not rely upon the *Linkletter* test in order to avoid applying *McLaughlin* to petitioner's case. Having reached the federal question and having found a violation of *McLaughlin*, the Nevada Supreme Court simply had no power to decline to apply *McLaughlin* to petitioner's case, under the plain terms of *Griffith* and *Harper*, and under this Court's general Supremacy Clause jurisprudence. E.g., *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958). Since there is no question that the Nevada Supreme Court did find that *McLaughlin* had been violated but did not apply *McLaughlin* to petitioner's case on retroactivity grounds, JA 6 n.1; 838 P.2d at 924 n.1, the judgment must be reversed.

IV. THE NEVADA SUPREME COURT HAD THE POWER TO REACH THE FEDERAL CONSTITUTIONAL ISSUE DECIDED IN THIS CASE AND THIS COURT THEREFORE HAS JURISDICTION TO REVIEW ITS DECISION.

Respondent contended in its opposition to the petition for certiorari that the *McLaughlin* issue was not properly before the Nevada Supreme Court. The Nevada Supreme Court's power to reach and decide the *McLaughlin* issue despite the failure of the parties to raise it is as clear as the *McLaughlin* violation itself. There can be no reasonable dispute that the Supreme Court of Nevada, under its own governing law and practice, has the power to address issues not raised by the parties. It regularly exercises this power in both civil and criminal cases, not only to address issues which are raised on appeal although they were not preserved in the trial court,[10] but also to raise and address sua sponte issues not presented at all by the parties on appeal. For instance, in *Guy v. State*, 108 Nev. 770, 839 P.2d 578, 588 (1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1656 (1993), the appellant argued that several instances of prosecutorial misconduct were grounds for reversal, and the court rejected those arguments. The court then proceeded to identify another instance of misconduct, not raised by the appellant, and concluded on the merits that this instance did constitute prosecutorial

[10] The Nevada Supreme Court has the statutory power to review plain errors in the admission of evidence without an objection by the party below, Nev. Rev. Stats. § 47.040(2), and to review plain errors of all sorts affecting substantial rights in criminal cases. Nev. Rev. Stats. § 178.602. While it does not always invoke these provisions explicitly, the court frequently exercises what it recognizes as its own power to review plain errors or constitutional errors which have not been raised in the proceedings below. E.g., *Emmons v. State*, 107 Nev. 53, 61, 807 P.2d 718 (1991) (addressing prosecutorial misconduct issues despite absence of objection below); *Jones v. State*, 101 Nev. 573, 580, 707 P.2d 1128 (1985) (party's participation in drafting instructions does not bar consideration of constitutional errors in instruction).

misconduct but that it was harmless. In *Tahoe Village Homeowners v. Douglas Co.*, 106 Nev. 660, 662 n.1, 799 P.2d 556 (1990), the court reviewed a judgment of dismissal. Although the appellant had not raised the issue, the Supreme Court found that the trial court erred in dismissing one of the causes of action in the complaint because it did state a claim for relief. In *Bejarano v. State*, 106 Nev. 840, 843, 801 P.2d 1388 (1990), an appeal from the denial of postconviction relief, the court sua sponte raised and disposed of an issue of ineffective assistance of counsel based on trial counsel's failure to present evidence of mitigating factors in the penalty phase of a capital trial, when mitigating evidence was apparent in the trial record.

The Nevada Supreme Court treats this power as indisputable:

> "The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established. [citation] Such is the case where a statute which is clearly controlling was not applied by the trial court."

Bradley v. Romeo, 102 Nev. 103, 105, 716 P.2d 227 (1986).[11] The court's power to review plain errors is

[11] Accord, *Crow-Spieker #23 v. Helms*, 103 Nev. 1, 3, 731 P.2d 348 (1987) (reversing for error in finding breach of contract for right of first refusal to purchase land, where right of first refusal neither exercised nor implicated, and error "glaringly apparent upon the face of the record" despite failure of parties to raise it); *Jones v. State, supra*, at 580 (court raises the issue of whether error to give jury instruction on possibility of executive clemency in penalty phase of capital trial); *Summit v. State*, 101 Nev. 159, 161 n.2, 697 P.2d 1374 (1985) (reversing conviction for violation of defendant's right to confrontation resulting from application of rape shield law, although constitutional issue not raised on appeal); *Desert Chrysler-Plymouth v. Chrysler Corp.*, 95 Nev. 640, 643-644, 600 P.2d 1189 (1979) *cert. denied*, 445 U.S. 964 (1980) (court raises and disposes of separation of powers issue with respect to validity of statute, although not raised by parties); *Boswell v. Warden*, 91 Nev. 284, 285, 534 P.2d 1263 (1975) (reversing summary dis-

bestowed by statute,[12] and the court itself has explicitly recognized its own power to address issues sua sponte in its adoption of a rule governing its review of capital cases.[13]

In this case, the Nevada Supreme Court reached and decided the *McLaughlin* issue. Whether or not it was obligated to do so, under its own practice the court clearly

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missal of habeas corpus petition sua sponte); *Western Indus. v. General Ins. Co.*, 91 Nev. 222, 230, 533 P.2d 473, 478 (1975) (the court reviews an error in judgment for full value of stock, without providing for disposition of stock itself, although parties "raised no issue in this regard" on appeal); *Crescent v. White*, 91 Nev. 209, 210, 533 P.2d 159 (1975) (dismissing appeal on issue of absence of appealable order raised by court sua sponte); *Wilson v. Perkins*, 82 Nev. 42, 409 P.2d 976 (1966) (ordering redistribution of award of damages in compliance with statute, although issue not raised on appeal); *Radovich v. W.U. Tel. Co.*, 36 Nev. 341, 348, 135 P. 920 (1913) ("it would, we think, be unfortunate if it were an inflexible rule that a court of last resort, in all cases, could only consider questions actually discussed in the briefs"); see also *Torres v. Farmers Insurance Exchange*, 106 Nev. 340, 345 n.2, 793 P.2d 839 (1990) (even if party had not raised issue on appeal, reversal of summary judgment based upon provisions of insurance policies would have been required because insurer did not submit copies of policies to court on summary judgment motion; dictum).

The true extent to which the court actually exercises this power is unknown. The Nevada Supreme Court disposes of the vast majority of its cases through unpublished orders. See Notice, 99 Nev. 847 (1983). The terms of these decisions are not accessible since they are not published, and the number of cases in which the court has raised issues sua sponte in the course of rendering decisions in them is currently undetermined.

[12] Nev. Rev. Stats. § 178.602 provides:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

[13] Nevada Supreme Court Rule 250(IV)(H) permits the court to remand for further proceedings in the trial court "with respect to issues raised by the parties on appeal or perceived by the Supreme Court as being important although not asserted by the defendant or the state."

had the power to reach the federal constitutional question on its own motion. Accordingly, this Court's jurisdiction to review the federal question decided by the Nevada Supreme Court cannot be disputed. "We may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied. *Beecher v. Alabama*, 389 U.S. 35, 37 n.3 (1967)". *Michigan v. Long, supra*, 463 U.S. at 1038 n.4; *Ulster County Court v. Allen*, 442 U.S. 140, 149-154 (1979).

V. THERE HAS BEEN NO WAIVER OF PETITIONER'S RIGHT TO A PROMPT PROBABLE CAUSE DETERMINATION UNDER McLAUGHLIN.

Finally, respondent contended in the opposition to the petition for certiorari that there was a waiver of the *McLaughlin* error as a result of petitioner's waiver of his rights under *Miranda v. Arizona*. This argument is unsustainable for several reasons. The purported waiver cited by respondent, and discussed in the Nevada Supreme Court's opinion, does not refer at all to the probable cause issue arising from *McLaughlin*. Since the court explicitly held that it was not applying *McLaughlin* to petitioner's case, there was no reason for the court to discuss waiver with respect to that issue. Further, by its own terms, the court's discussion of waiver is not directed to the delay in the probable cause determination. Quoting *Deutscher v. State*, 95 Nev. 669, 680, 601 P.2d 407, 414 (1979), the court indicated "when an accused voluntarily waives his right to silence and his right to counsel, he concurrently waives his right to be seasonably *arraigned*." J.A. 6; 838 P.2d at 925 (emphasis supplied). In petitioner's case, the court held that "[b]y waiving those [*Miranda*] rights, he thereby waived his right to a timely arraignment [and] to an appearance before a magistrate within seventy-two hours." JA 7-8; 838 P.2d at 925 (citation omitted). By referring to the seventy-two hour limit, which is contained in Nev. Rev. Stats. § 171.178(3), the court made

it unmistakably clear that it was not referring to a waiver of *McLaughlin* rights but only to a waiver of rights under the statute which it had just held was unconstitutional under *McLaughlin*.

The Nevada Supreme Court's discussion of a purported waiver also centers on the policies which are served by timely arraignment and by the giving of *Miranda* warnings, which are identified by the court as interests protected by the Fifth and Sixth Amendments. JA 7-8; 838 P.2d at 925. The interest protected by *McLaughlin*, however, is a Fourth Amendment interest, the right not to be imprisoned without a judicial determination of probable cause. Since the Nevada Supreme Court explicitly declined to apply *McLaughlin*, it is hardly surprising that it did not discuss any purported waiver of Fourth Amendment rights under *McLaughlin*, and the absence of any such discussion in turn indicates that no finding of waiver can be made.

Even if any language regarding waiver in the Nevada Supreme Court's opinion could be viewed as relevant to *McLaughlin*, there would be no substantive basis for implying a waiver of Fourth Amendment rights from a waiver of Fifth and Sixth Amendment rights. As Justice Scalia's opinion for the Court in *McNeil v. Wisconsin*, —— U.S. ——, 111 S.Ct. 2204 (1991) recognized, the interests protected by the Fifth and Sixth amendments are different, and an invocation of rights under one amendment does not imply an invocation of rights under another. By the same token, a waiver of rights under one constitutional provision cannot be construed as "an intentional relinquishment or abandonment of a known right or privilege", *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), under a separate constitutional provision protecting different interests. Indeed, this Court has recognized this fact explicitly: "The *Miranda* warnings in no way inform a person of his Fourth Amendment rights, including his right to be released from unlawful custody . . . ." *Brown v. Illinois, supra*, 422 U.S. at 601 n.6. The fact that

Miranda warnings are not meant as a substitute for promptly bringing the suspect before a magistrate is also recognized in the *Miranda* decision itself. 384 U.S. at 463 n.32. This is simple common sense:

> "there is a sharp psychological contrast between a scene in a jail in which an arrested person is told of his or her rights by police officers and a scene in a courtroom or judicial chambers in which an arrested person is told of his or her rights by a neutral and detached magistrate. Also, it seems that the argument [that a *Miranda* waiver also waives the right to a prompt first appearance] proves too much; if valid, it means that there need be little urgency in bringing an arrested person before a magistrate."

United States v. Erving, 388 F.Supp. 1011, 1020-1021 (W.D. Wis. 1975). Thus to the extent that the decision below, and the *Deutscher* decision on which it relies, assume that a waiver of *Miranda* rights waives any claim of unreasonable delay in any initial proceeding and necessarily validates admission of a statement elicited after a period of illegal detention, that position is in conflict with this Court's precedents. Accordingly, the waiver discussion in the Nevada Supreme Court's opinion does not and cannot affect the issue presented before this Court.

Further, the waiver rule relied upon by the Nevada Supreme Court, derived ultimately from *Pettyjohn v. United States*, 419 F.2d 651, 655-656 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970), is unsound in itself. In *Pettyjohn*, the defendant went to the police station to "turn himself in" and confessed to two murders. He was immediately arrested and informed of his *Miranda* rights, and he gave a statement. Subsequently he moved to suppress the statement on the ground that he was not "promptly" taken before a magistrate. The court stated:

> "We feel that appellant's argument here borders on the absurd. Surely the law does not allow a person to voluntarily discuss the crime to which he has

> just confessed for a period of some twenty minutes and then claim on appeal that the twenty minute period during which they spoke constituted a prejudicial delay in violation of his right to rapid arraignment."

Id. at 656. Referring to language from *Frazier v. United States,* 419 F.2d 1161, 1166 (D.C. Cir. 1969), holding that "[a] valid *Miranda* waiver is necessarily, for the duration of the waiver, also a waiver of an *immediate* judicial warning of constitutional rights" (emphasis supplied and deleted; footnotes omitted), the court concluded that there had been no violation of *Mallory v. United States,* 354 U.S. 449 (1957) and *McNabb v. United States,* 318 U.S. 332 (1943). *Pettyjohn v. United States,* 419 F.2d at 656.

The most the *Pettyjohn* decision legitimately stands for is the proposition that a waiver of *Miranda* rights and the giving of a statement waives a claim that the first appearance before a magistrate was unnecessarily delayed during the time it took to record the statement. *Pettyjohn*'s extremely dubious progeny, e.g., *Deutscher v. State,* 95 Nev. at 680; *United States v. Indian Boy X,* 565 F.2d 585, 591 (9th Cir. 1977), *cert. denied,* 439 U.S. 841 (1978); *United States v. Woods,* 468 F.2d 1024, 1026 (9th Cir.), *cert. denied,* 409 U.S. 1045 (1972), treat that rule as if a waiver of *Miranda* rights excuses any illegal detention, however prolonged or coercive. Allowing an indefinite delay in arraignment, or in any other judicial process, solely because the defendant has once waived his *Miranda* rights, deforms the common sense rule of *Pettyjohn* beyond all reason and cannot be accepted by this Court. See *Brown v. Illinois, supra,* 422 U.S. at 603.

In any event, the concept of waiver is particularly ill-suited to analysis of delay in a probable cause determination. By definition, a waiver is an individual's own "intentional relinquishment of a known right or privilege." *Johnson v. Zerbst, supra,* 304 U.S. at 464. This implies

action by the individual in deciding which of various courses to take. But an incarcerated suspect, before appointment of counsel at arraignment, has no ability to secure a probable cause determination: the suspect is completely within the power of the police or other authorities and is entirely dependent upon those authorities to bring him before a magistrate, process the paperwork to subject the warrantless arrest to judicial review, or take any other action with respect to the suspect's status. Some courts have therefore recognized that the suspect's rights with respect to the timeliness of the initial stages of the formal criminal process, which only the state can initiate, are not waivable by the defendant. *United States v. Haupt,* 136 F.2d 661, 671 (7th Cir. 1943); *Dainard v. Johnson,* 149 F.2d 749, 751 (9th Cir. 1945) (dictum); *United States v. Cooper,* 504 F.2d 260, 265, n.3 (D.C. Cir. 1974) (Fahy, J., concurring). The rule of *Pettyjohn,* which recognizes an implied waiver only as to the time necessary to complete other steps required by the suspect's participation in administrative processing, is consistent with these cases and with the principle underlying *Gerstein* and *McLaughlin,* which permits delay only to the extent that it is necessary.

Finally, in the context of this case, there is nothing before the court suggesting that a waiver, if one is possible, actually occurred. There is no dispute that the purported waiver of timely arraignment referred to by the Nevada Supreme Court occurred on November 7, 1989, after the forty-eight hour limit prescribed by *McLaughlin* had already expired; thus the constitutional violation at issue was complete before any purported waiver was elicited. Petitioner has been able to find no case in which an "ex post facto" waiver of a constitutional violation has been recognized. A somewhat analogous situation is presented by cases involving the admission of multiple statements by a defendant, when one statement is obtained in violation of *Miranda* but other statements are elicited in compliance with *Miranda.* These cases generally analyze

whether the other statements were products of the inadmissible statement or whether introduction of the other statements renders harmless the error in admitting the constitutionally infirm one; but no such case has ever purported to find that a valid waiver of *Miranda* rights as to one statement waives the constitutional violation with respect to a different one. See *Milton v. Wainwright*, 407 U.S. 371, 372-377 (1972); *Oregon v. Elstad*, 470 U.S. 298, 314-318 (1985); *United States v. Johnson*, 816 F.2d 918, 923 (3d Cir. 1987); cf. *United States v. Mitchell*, 322 U.S. 65, 69-70 (1944) (illegal prolongation of detention does not require exclusion of statements properly obtained before illegal detention; dictum). Under these circumstances, there is no basis whatsoever for finding a waiver of petitioner's rights under *McLaughlin*.

CONCLUSION

For the reasons stated above, this court must vacate the judgment and remand this case to the Supreme Court of Nevada for further proceedings in light of *County of Riverside v. McLaughlin* and *Griffith v. Kentucky*.

Respectfully submitted,

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